Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NO M–02–388 OF 2001 AND NO M–02–530 OF 2001

GOPAL SRI RAM, MOHD GHAZALI AND AZMEL JJCA

24 NOVEMBER 2004

Civil Procedure — Damages — Exemplary damages — Sale of land — Failure to vacate land — Plaintiff obtained a writ of possession and proceeded to execute it — Defendant counterclaimed for damages — Trial judge made his award on the basis that the matter concerned general damages — Whether this error flawed the judgment — Whether trial judge's finding on quantum unsupported by any evidence or suffers from an error in principle — Whether appealable error had been demonstrated — Whether plaintiff in executing the writ of possession obtained a profit at the expense of the defendant — Whether trial judge correct in awarding exemplary damages

There were two appeals. The appellant in the first appeal ('plaintiff') is the owner of a piece of land ('the Semabok land'). At all material times the respondent in the first appeal ('defendant') was in occupation of the Semabok land. On 11 August 1983, the plaintiff and defendant entered into an agreement ('the August 1983 agreement') where: (i) the defendant was to assign and/or surrender all his interest and rights in and to the portion of the Semabok land to the plaintiff; (ii) in consideration of the defendant's promise, the plaintiff was to pay the defendant a certain sum of money as compensation. The plaintiff said it had to pay RM30,000. But the defendant said that he had been promised RM100,000; and (iii) the defendant was to vacate the Semabok land on or before 15 August 1984 failing which, the plaintiff was entitled to take eviction proceedings against him. The plaintiff did not take any steps to enforce the August 1983 agreement for quite some time. It issued writ only on 7 November 1991. The defendant entered appearance but defaulted in delivering his defence. On 26 May 1992, the plaintiff entered judgment in default of pleading. He took out a summons to set aside the default judgment. He served his summons on the plaintiff. Almost at once after being served with the defendant's summons, the plaintiff applied for a writ of possession and proceeded to execute it. Pursuant to the execution the defendant's goods were removed from the Semabok land. A quantity of these goods was lost. The default judgment was set aside on 28 November 1995, following which the defendant delivered his defence and counterclaim. On 17 September 1997, the defendant consented to judgment on the plaintiff's claim for vacant possession. Later, the defendant delivered an amended defence and counterclaim in which he grounded his case on trespass to goods. The learned judge found for the defendant. The learned judge dismissed the plaintiff's claim and found for the defendant on its counterclaim. He proceeded to award a sum of RM400,000 as general damages and a sum of RM50,000 as exemplary damages. He also allowed the defendant's claim for RM70,000 as balance of the sum which the defendant said was due under the August 1983 agreement. The plaintiff appealed against the award of damages while the defendant appealed against inadequacy of damages.

Held, allowing the plaintiff's appeal in part and dismissing the defendant's appeal:

(1) The learned judge made his award on the basis that the matter concerned general damages. The classification of the defendant's claim in his counterclaim as general damages was an error. But this error did not flaw the judgment under appeal. What is of importance is the way in which the learned judge approached the issue and the considerations he took into account when making his award. The learned judge took into account all those factors that usually influence a court making an assessment of special damages. He was clear in his mind that the defendant's valuation was far too excessive. He also gave due weight to the evidence of the plaintiff's witnesses on the issue of quantum. The issue was clearly one on which the opinion of individual judges was bound to differ. Hence the Court of Appeal will not disturb the trial judge's views on matters of this nature. The plaintiff has not discharged its burden by demonstrating that the learned judge's finding on quantum was unsupported by any evidence or suffers from an error in principle (see paras 14–15).

(2) The plaintiff have fallen far short of the standard called for in *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22. No appealable error has been demonstrated (see para 17).

(3) What the plaintiff was seeking to do was to get possession of its land. It was entitled to have its land back. No question of obtaining a profit at the expense of the defendant's rights arises here. The plaintiff had tried to steal a march on his client by seeking the writ of possession after it had notice of the application to set aside judgment. But that was not conduct calculated to make a profit at the defendant's expense. This is not a case for exemplary damages (see para 19).

[Bahasa Malaysia summary

Terdapat dua rayuan. Perayu dalam rayuan pertama ('plaintif') adalah pemilik sekeping tanah ('tanah Semabok'). Pada setiap masa matan responden dalam rayuan pertama ('defendan') menetap atas tanah Semabok tersebut. Pada 11 Ogos 1983, plaintif dan defendan telah memasuki satu perjanjian ('perjanjian Ogos 1983') di mana: (i) defendan hendaklah menyerah dan/atau melepaskan semua kepentingan dan haknya ke atas bahagian tanah Semabok itu kepada plaintif; (ii) sebagai balasan janji defendan, plaintif hendaklah membayar defendan sejumlah wang sebagai pampasan. Plaintif berkata ia perlu membayar RM30,000. Namun defendan berkata bahawa beliau telah dijanjikan RM100,000; dan (iii) defendan hendaklah mengosongkan tanah Semabok itu pada atau sebelum 15 Ogos 1984 jika tidak, plaintif berhak memulakan prosiding pengusiran terhadap beliau. Plaintif tidak mengambil apa-apa tindakan untuk menguatkuasakan perjanjian Ogos 1983 tersebut buat beberapa lama. Ia telah mengeluarkan writ hanya pada 7 November 1991. Defendan telah memasuki kehadiran tetapi gagal menyampaikan pembelaan beliau. Pada 26 Mei 1992, plaintif telah memasuki penghakiman ingkar terhadap pliding. Beliau mengeluarkan sama untuk menepikan penghakiman ingkar itu. Beliau telah menyampaikan saman beliau ke atas plaintif. Dengan segera selepas disampaikan dengan sama defendan, plaintif telah memohon untuk writ milikan dan terus melaksanakannya. Menurut pelaksanaan, barangan defendan telah dialih

daripada tnah Semabok. Sebahagian besar barangan tersebut hilang. Penghakiman ingkar telah diketepikan pada 28 November 1995 berikutannya defendan telah menyampaikan pembelaan dan tuntutan balasnya. Pada 17 September 1997, defendan telah bersetuju terhadap penghakiman berhubung tuntutan plaintif untuk milikan kosong. Kemudian, defendan telah menyampaikan satu pembelaan dan tuntutan balas yang dipinda yang man beliau dasari kesnya kerana pencerobohan terhadap barangan. Hakim yang bijaksana memutuskan berpihak kepada defendan. Hakim yang bijaksana telah menolak tuntutan plaintif dan memihak kepada defendan berdasarakn tuntutan balasnya. Beliau seterusnya mengawardkan sejumlah RM400,000 sebagai ganti rugi am dan sejumlah RM50,00 untuk ganti rugi tauladan. Beliau juga membenarkan tuntutan defendan sebanyak RM70,000 sebagai baki jumlah yang defendan katakan perlu dibayar di bawah perjanjian Ogos 1983 itu. Plaintif merayu terhadap award ganti rugi sementara defendan merayu terhadap ganti rugi yang tidak memadai.

Diputuskan, membenarkan sebahagian rayuan plaintif dan menolak rayuan defendan:

(1) Hakim yang bijaksana telah membuat award beliau berdasarkan perkara itu adalah suatu yang berkaitan ganti rugi am. Klasifikasi tuntutan defendan dalam tuntutan balas beliau sebagai ganti rugi am adalah satu kekhilafan. Namun kekhilafan ini tidak mencacatkan penghakiman yang dirayukan. Apa yang penting adalah cara bagaimana hakim yang bijaksana menangani persoalan tersebut dan pertimbangan yang beliau ambilkira semasa membuat award tersebut. Hakim yang bijaksana telah mengambilkira semua faktor yang biasa mempengaruhi mahkamah dalam membuat penaksiran ganti rugi khas. Beliau jelas pemikirannya bahawa penilaian defendan agak melampau. Beliau juga mengambilkira beban keterangan saksi-saksi pleintif berhubung persoalan kuantum. Persoalan tersebut jelas suatu yang mana pendapat setiap hakim adalah berbeza. Justeru itu Mahkamah Rayuan tidak akan mengganggu pendapat hakim perbicaraan berhubung perkara bersifat sedemikian. Plaintif tidak melepaskan bebannya dengan menunjukkan bahawa penemuan hakim yang bijaksana berhubung kuantum tidak disokong dengan apa-apa keterangan atau mengalami kesilapan prinsip (lihat perenggan 14–15).

(2) Plaintif tidak menepati standard yang diperlukan seperti dalam *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22. Tiada kesilapan yang boleh dirayukan telah ditunjukkan (lihat perenggan 17).

(3) Apa yang plaintif ingin lakukan adalah untuk mendapat milikan tanah tersebut. Ia berhak untuk mendapat balik tanah itu.Tiada persoalan tentang memperoleh keuntungan dari hak defendan timbul di sini. Plaintif telah cuba nasib dengan anakguamnya dengan memohon writ milikan selepas ia mengeluarkan notis permohonan untuk menepikan penghakiman. Namun perbuatan itu tidak membentuk satu keuntungan dari kelemahan defendan. Ia bukan satu kes untuk ganti rugi tauladan (lihat perenggan 19).]

Notes

For cases on exemplary damages, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2035–2037.

Cases referred to

Marian Rebello v K Periathambv (1931–1932) FMSLR 37 (refd)
Rookes v Barnard [1964] AC 1129 (refd)
Ryan v Jarvis [2005] UKPC 27 (refd)
Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22 (refd)

Appeal from: Civil Suit No 22–144 of 1991 (High Court, Melaka)

Trevor George De Silva (Mohd Rohaisherin bin Hj Rosli with him) (Lee Ong & Kandiah) for the appellant in Civil Appeal No M–02–388 of 2001.
B Thangaraj (Azad Bashir with him) (Bashir & Asha) for the respondent in M–02–388 of 2001.
B Thangaraj (Azad Bashir with him) (Bashir & Asha) for the appellant in M–02–530 of 2001.
Trevor George De Silva (Mohd Rohaisherin bin Hj Rosli with him) (Lee Ong & Kandiah) for the respondent in Civil Appeal No M–02–530 of 2001.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] There are two appeals before us. We heard argument on them on 1 August 2005 and reserved judgment. Both appeals relate to the quantum of damages awarded by the learned trial judge. The factual matrix against which these appeals rest is as follows.

[2] The appellant in the first appeal (plaintiff in the court below) is the owner of a piece of land. I will call it 'the Semabok land'. At all material times the respondent in the first appeal (defendant in the court below) was in occupation of the Semabok land. On 11 August 1983, the plaintiff and defendant entered into an agreement ('the August 1983 agreement') the relevant terms of which were these:

(i) the defendant was to 'assign and or surrender all his interest and rights in and to the portion of the said land occupied by him together with the said house' to the plaintiff;

(ii) in consideration of the defendant's promise, the plaintiff was to pay the defendant a certain sum of money as compensation. The plaintiff said it had to pay RM30,000. But the defendant said that he had been promised RM100,000. The quantum of the payment therefore became the subject matter of a fully blown dispute;

(iii) the defendant and all those claiming under or through him were to vacate the Semabok land on or before 15 August 1984;

(iv) in the event the defendant failed to deliver vacant possession by the said date, the plaintiff was 'entitled to take eviction proceedings' against him.

[3] As I said, there was a dispute about the amount payable. The agreement expressly provided in cl 2 for the payment of RM30,000 but went on in cl 2(b) to say that:

> the balance shall be paid immediately upon the Occupier his subtenants/licencees and all those lawfully claiming under him vacating the surrendered portion as hereinafter provided.

However, there is no dispute that the sum of RM30,000 was indeed paid.

[4] It appears that the plaintiff did not take any steps to enforce the August 1983 agreement for quite some time. It issued writ only on 7 November 1991 The defendant entered appearance but defaulted in delivering his defence. So, on 26 May 1992 the plaintiff entered judgment in default of pleading. In the meantime, the defendant was adjudged a bankrupt on 16 April 1992. He took out a summons to set aside the default judgment. He served his summons on the plaintiff. Almost at once after being served with the defendant's summons, the plaintiff applied for a writ of possession and proceeded to execute it. Pursuant to the execution the defendant's goods were removed from the Semabok land. They were placed by the roadside near another land belonging to the plaintiff. A quantity of these goods were lost.

[5] The default judgment was set aside on 28 November 1995, following which the defendant delivered his defence and counterclaim. On 17 September 1997, the defendant consented to judgment on the plaintiffs claim for vacant possession. Later, the defendant delivered an amended defence and counterclaim in which he grounded his case on trespass to goods, although he may well have relied on the tort of conversion as well. The learned judge found for the defendant. He held that although the bailiff had executed the writ of possession, the defendant's goods had been removed by the plaintiffs servants or agents. He also found that so far as the bailiffs role in the removal of the defendant's goods was concerned, he had acted as the plaintiffs agent. He concluded that the plaintiff had interfered with the defendant's goods without lawful justification. That finding, in my view, is correct. The writ of possession did not authorise the plaintiff to remove the defendant's goods. If the plaintiff wanted to have those goods removed, then it should have obtained an order from the court in that behalf.

[6] The learned judge after referring to the judgment of Elphinstone CJ in *Marian Rebello v K Periathamby* (1931–1932) FMSLR 37 said (in the English translation of his judgment provided to us):

> In this case before me, PW2 had already prepared lorries and cranes to transport the defendants goods, which were on the property in respect of which possession was granted to the plaintiff without an order to move the goods. By moving the goods to the roadside onto the land owned by the plaintiff without giving notice to the defendant and obtaining his permission to enter and remove the goods, the plaintiff had committed trespass and is liable for the loss of the defendant's goods.

[7] In my judgment, this is an entirely correct direction on the facts and the law. The plaintiff therefore rightly decided not to press its appeal on the issue of liability. That, then, leaves only the issue of damages.

[8] In his pleaded case the defendant made the following claims: (i) that there was a sum of RM70,000 due to him from the plaintiff under the agreement of 11 August 1983; (ii) that the plaintiff had committed trespass on the land by executing the writ of possession without giving reasonable notice; (iii) that his goods had been converted by the plaintiff. After a trial at which viva voce evidence was led, the learned judge dismissed the plaintiffs claim and found for the defendant on its counterclaim. He proceeded to award a sum of RM400,000 as general damages and a sum of RM50,000 as exemplary damages. He also allowed the defendant's claim for RM70,000 as balance of the sum which the defendant said was due under the 11 August 1983 agreement.

[9] We were informed by counsel that when these appeals came before a differently constituted Bench, the defendant had informed the court that he was not supporting the learned judge's award of RM70,000. That award was, by consent, then set aside by that Bench.

[10] The next item is the award of RM400,000. In support of this part of its case, the defendant called an expert witness. He was DW2 in the High Court. He got his information about the nature of the defendant's trade goods from the defendant himself. In the course of his arguments before us, learned counsel for the plaintiff submitted that the expert's evidence was hearsay. I cannot agree. The argument would have mattered if the defendant had not given evidence. But here the defendant did give evidence and was cross examined at length about the value of his trade goods. So, no question of hearsay arises.

[11] But there is a more serious point taken by Mr Trevor George of counsel for the plaintiff which has merit. He says that the learned trial judge did not critically analyse the defendant's evidence on the value of his trade and business goods. The defendant's claim as formulated in his counterclaim was that the goods in question were worth more than RM800,000. What the learned judge did was to award about half that figure. In doing so, he accepted the defendant's version that the receipts for the goods had been lost. The learned judge then said (according to the translated version of his judgment):

> I accept the possibility that the said receipts existed but what is disputed is the value of the said goods. *Here I observe that the quantity of goods being claimed was not challenged.*
>
> To ascertain the value of the goods, the defendant called a registered valuer — DW4. DW4 could only give an estimated value but could not give the amount.' (Emphasis added.)

[12] Let me say this about the learned judge's observations. First, in my judgment, he was perfectly entitled to make the findings he did about the lost receipts and this court, in accordance with well settled principles, should not interfere with his decision on the point. As recently as 27 June 2005, the Judicial Committee of the Privy Council in *Ryan v Jarvis* [2005] UKPC 27, an appeal from Antigua & Barbuda, reiterated this point. Lord Hoffmann who delivered the advice of the Board said:

A It is of course most unusual for an appellate tribunal to reverse a trial judge's findings on credibility on the ground that the evidence which he rejected has the ring of truth. The true or false note is generally more audible to the judge who hears and sees the witnesses than to the appellate court reading the record.'

B **[13]** Second, the learned judge correctly addressed his mind to the crucial fact that the plaintiff did not challenge the number of goods that formed the subject matter of the defendant's claim. This, of course, seriously restricts the plaintiff and this court from raising any question about the items that went missing. All that was left for the learned judge was to place a value on the missing goods. This is how he approached that issue:

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The plaintiff had called two witnesses PW4 for the purpose of giving the pricing for the moulds and PW5, a mechanic, to ascertain the price of the machines. I am of the opinion that both of these witnesses are not experts, as they do not have the background, which qualifies them as experts. Not withstanding the same, I used their evidence for the purpose of obtaining a contrary view of the price of the goods claimed.

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The receipts for the goods claimed are lost. I also cannot accept the evaluation by DW4 totally as there are machines for instance, which had become scrap metal and it was also based on his opinion from the shops selling those goods.

In this case, the problem of damages arose because the plaintiff, with its rash behaviour, had caused the loss of the receipts of the goods claimed. I at the same time, reminded myself that there were goods lost which were more than 15 years old, there were machines which were left abandoned and covered with growth, left in the rain and heat but there were also some that I saw from the pictures taken at the side of Ayer Leleh which had not yet rusted.

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F The plaintiffs and the defendant's witnesses gave very different views. I hold that it would be more equitable to award RM400,000 as general damages with interest from the date of the filing of the counterclaim.

[14] Earlier in his judgment the learned judge correctly described the defendant's claim amounting to RM835,095 as one for special damages. However, as may be seen G from the passage just quoted, he made his award on the basis that the matter concerned general damages. The classification of the defendant's claim in his counterclaim as general damages is, with great respect to the learned judge, an error. General damages are awarded for harm that is not quantifiable. Special damages are awarded where the damage suffered is readily quantifiable in monetary terms. H Damages for personal injuries suffered by a litigant are an example of general damages. So, an award for the loss of an arm sounds in general damages. Another example of general damages is compensation that is awarded by a court for injury to reputation. But a claim for the loss of actual earnings by an injured plaintiff is one for special damages. So, in this case, the value that is to be placed on the defendant's goods is something that is readily quantifiable and compensation for the loss of the I goods is special damages.

[15] But does this error flaw the judgment under appeal? With respect, I do not think that it does. What is of importance is the way in which the learned judge approached the issue and the considerations he took into account when making his

award. In this respect I find his judgment beyond criticism. He took into account all those factors that usually influence a court making an assessment of special damages. He was clear in his mind that the defendant's valuation was far too excessive. He also gave due weight to the evidence of the plaintiffs witnesses on the issue of quantum. The issue is clearly one on which the opinion of individual judges is bound to differ. Hence the salutary rule that a court of appeal will not disturb a trial judge's views on matters of this nature. And I am really not convinced that the plaintiff has discharged its burden in this appeal by demonstrating that the learned judge's finding on quantum is unsupported by any evidence or suffers from an error in principle.

[16] The approach of an appellate court to an appeal against quantum of damages in cases of special damage was referred to by Abdul Hamid CJ (Malaya) in *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22. That was a case in which the plaintiff had claimed loss of income in a personal injury action - a claim for special damages. The evidence was that the plaintiffs business was producing a profit of RM600. Yet the trial judge awarded RM1,000 per month. On appeal, the Supreme Court set aside the award. The learned Chief Justice of Malaya said:

> 'The principle that could guide this court in determining whether it should interfere with the quantum of damages is crystal clear. What is also clear is that much depends on the circumstances of each case, in particular the amount of the award. In a particular case therefore it is for the appeal court to consider whether in the light of the circumstances of that case there is an erroneous estimate of the amount of the damage in that, either there was *an omission on the part of the Judge to consider some relevant materials, or he had admitted for purposes of assessment some irrelevant considerations.* If the court is satisfied or convinced that the Judge has acted upon wrong principles of law then it is justified in reversing; indeed, it is its duty to reverse the finding of the trial Judge. (Emphasis added.)

[17] Having given this case my most anxious consideration, I find the plaintiff to have fallen far short of the standard called for by the Chief Justice of Malaya in *Tan Kuan Yau v Suhindrimani*. No appealable error has been demonstrated. I would therefore uphold the learned judge's award of RM400,000.

[18] I now I turn to consider the award of exemplary damages. The basis for making an award of exemplary damages was set out by Lord Devlin in *Rookes v Barnard* [1964] AC 1129, where after a discussion of some of the authorities on the subject he proceeded as follows:

> These authorities convince me of two things. First, that your lordships could not without a complete disregard of precedent, and indeed of statute, now arrive at a determination that refused altogether to recognise the exemplary principle. Secondly, that there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law, and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal. I propose to state what these two categories are; and I propose also to state three general considerations which, in my opinion, should always be borne in mind when awards of exemplary damages are being made. I am well aware that what I am about to say will, if accepted, impose limits not hitherto expressed on such awards and that there is powerful, though not compelling, authority for allowing them a wider range. I shall not therefore conclude what I have to say

on the general principles of law without returning to the authorities and making it clear to what extent I have rejected the guidance which they may be said to afford.

The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category, I say this with particular reference to the facts of this case, to oppressive action by private corporations or individuals. Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might perhaps be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service. It is true that there is something repugnant about a big man bullying a small man and very likely the bullying will be a source of humiliation that makes the case one for aggravated damages, but it is not in my opinion punishable by damages.

Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. I have quoted the dictum of Erie CJ in *Bell v Midland Ry Co* (1861), 10 CBNS at p 304. Maule J in *Williams v Currie* (1845), 1 CB at p 848, suggests the same thing; and so does Martin B in an obiter dictum in *Crouch v Great Northern Ry Co* (1856) 11 Exch 742 at p 759. It is a factor also that is taken into account in damages for libel; one man should not be allowed to sell another man's reputation for profit. Where a defendant with a cynical disregard for a plaintiffs rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object, perhaps some property which he covets, which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.

To these two categories, which are established as part of the common law, there must of course be added any category in which exemplary damages are expressly authorised by statute.

I wish now to express three considerations which I think should always be borne in mind when awards of exemplary damages are being considered. First, the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. The anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence. Secondly, the power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty, as in the *Wilkes* case (1763), Lofft, can also be used against liberty. Some of the awards that juries have made in the past seem to me to amount to a greater punishment than would be likely to be incurred if the conduct were criminal; and moreover a punishment imposed without the safeguard which the criminal law gives to an offender. I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with restraint. It may even be that the House may find it necessary to follow the precedent it set for itself in *Benham v Gambling* [1941] AC 157, and place some arbitrary limit on awards of damages that are made by way of punishment. Exhortations to be moderate may not be enough. Thirdly, the means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. Everything which aggravates or mitigates the defendant's conduct is relevant.

Thus a case for exemplary damages must be presented quite differently from one for compensatory damages; and the judge should not allow it to be left to the jury unless he is satisfied that it can be brought within the categories which I have specified.'

[19] It was submitted to us by learned counsel for the defendant that the present case comes within Lord Devlin's second category. With respect, I cannot agree. As I pointed out to Mr Thangaraj during argument, there was simply no evidential backing for the suggestion. What the plaintiff was seeking to do was to get possession of its land. It was entitled to have its land back. No question of obtaining a profit at the expense of the defendant's rights arises here. Mr Thangaraj said that the plaintiff had tried to steal a march on his client by seeking the writ of possession *after* it had notice of the application to set aside judgment. True enough. But that is not conduct calculated to make a profit at the defendant's expense. At best, it was procedural misconduct for which they were mulcted in costs. That was their punishment. I will therefore say it once again: this is not a case for exemplary damages.

[20] For the reasons already given, I would allow the plaintiffs appeal in part and set aside the award for exemplary damages. By reason of all that I have said thus far, the defendant's appeal against inadequacy of damages must a fortiori fail. Since the plaintiff has succeeded only in a small part of its appeal, I would award the plaintiff 15% of its taxed costs in its own appeal. It will have its full profit costs and out of pockets in the defendant's appeal. But it shall be entitled to only one item of getting up, that is to say in its own appeal. It shall not be allowed any getting up in the defendant's appeal. The deposits in both appeals will be paid out to the plaintiff, one by way of refund and the other as to account of taxed costs. I must say a word about the order for costs made in the court below. I do not think that it should be disturbed. That is because, the defendant was put to establishing its case of trespass; a case not controverted before us by the plaintiff.

[21] I would dispose of these appeals in the foregoing terms. And by way of postscript I will add these remarks. When I first heard arguments, I thought that the award of RM400,000 should be substituted with an award of nominal damages. However, having read and re-read the judgment under appeal, I arrived at the conclusion that that award should not be disturbed for the reasons I have already given.

[22] My learned brothers Mohd Ghazali and Azmel JJCA have seen this judgment in draft and have expressed their agreement with it.

Plaintiff's appeal allwed in part. Defendant's appeal dismissed.

Reported by Peter Ling